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Negligence--Res Ipsa Loquitor--Use Denied Gratuitous Guest Passenger in Action Against Driver of Motor Vehicle

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NEGLIGENCE—*Res Ipsa Loquitur*—USE DENIED GRATUITOUS GUEST PASSENGER IN ACTION AGAINST DRIVER OF MOTOR VEHICLE.—*P* was riding in the bucket of a tractor-loader during a parade, and was severely injured when suddenly dumped to the ground. The vehicle was found to be in good mechanical condition. The only known manner by which the bucket could release its contents was by the operation of levers located in the cab which was occupied by *D*, the driver, and *D*'s seven year old daughter. Due to his position, it was impossible for *P* to see or prove affirmatively what caused the accident. He relied on the doctrine of *res ipsa loquitur* to recover. *Held,* reversing the decision of the circuit court, that *res ipsa loquitur* is inapplicable in all motor vehicle cases in which the gratuitous guest seeks to recover damages for personal injuries against the driver of the vehicle. *Ellis v. Henderson,* 95 S.E.2d 801 (W. Va. 1956); dissenting opinion, 95 S.E.2d 801 (W. Va. 1957) (3-2 decision).

The elements of the doctrine of *res ipsa loquitur* in West Virginia are generally three: (1) the accident was of the type which would not ordinarily occur in the absence of negligence, *Redman v. Community Hotel Corp.,* 138 W. Va. 456, 76 S.E.2d 759 (1953); (2) the instrumentality which caused the accident was under the exclusive control of the defendant, *Cunningham* v. *Parkersburg Coca-Cola Bottling Co.,* 137 W. Va. 827, 74 S.E.2d 409 (1953); (3) the accident was not caused by the plaintiff, *Wright v. Valan,* 130 W. Va. 466, 43 S.E.2d 364 (1947). Some jurisdictions employ a fourth element: that the defendant must have superior knowledge or access to evidence as to the cause of the accident. *Cantley v. Missouri-Kansas-Texas Ry.,* 353 Mo. 605, 183 S.W.2d 123 (1944).

It would appear initially that all of the above requirements were met by the plaintiff, yet recovery was denied. A determination of the basis of the court's decision is the subject of this comment.

Only the questionable fourth element was more than listed by the court, and it was mentioned in such a cursory manner that it is impossible to state with any degree of certainty whether or not our court is now requiring it as a necessary element in the doctrine of *res ipsa loquitur.*

If this element—the necessity of superior knowledge by the defendant—is now required, it is submitted that under the facts in the principal case it was fulfilled. The bucket could be operated only by levers in the cab. The defendant was in the cab; the plain-

tiff was not, he being some distance away in the bottom of a bucket suspended on the end of a boom. The plaintiff could not even see into the cab. The court did not attempt to explain why or how the defendant was not possessed of superior knowledge.

It is further submitted that this element should not be a prerequisite for the application of the doctrine. To require it is to place a premium on ignorance. HARPER & JAMES, TORTS § 19.9 (1956). To support it is to assert that one in ignorance of the cause of the accident is either not negligent or not liable. If, as in the principal case, the plaintiff can rely only on *res ipsa loquitur* to recover, whichever line of reasoning is followed will preclude recovery. See Palmer v. Brooks, 350 Mo. 1055, 169 S.W.2d 906 (1943). Neither is the superior knowledge element supported by a majority of the courts or the leading tort authorities. See PROSSER, TORTS § 42 (2d ed. 1955); HARPER & JAMES, *supra; Ziino v. Milwaukee Electric Ry. & Transport Co.*, 272 Wis. 21, 74 N.W.2d 791 (1956); *Haasman v. Pacific Alaska Air Express*, 100 F. Supp. 1 (D. Alaska 1951); *Thompson v. Kost*, 298 Ky. 32, 181 S.W.2d 445 (1944); *Nicol v. Geitler*, 188 Minn. 69, 247 N.W. 9 (1933). But see *Seven-Up Bottling Co. v. Gretes*, 182 Va. 138, 27 S.E.2d 925 (1943); *Alexander v. Wong Yick*, 25 Cal. App. 2d 265, 77 P.2d 476 (1938); *Loprestie v. Roy Motors*, 191 La. 239, 185 So. 11 (1938).

Further clarification and justification of the court's position is imperative for future preparation of *res ipsa loquitur* cases. An explicit discussion and explanation of the basis of the decision will probably indicate that the court is not creating additional barriers for the plaintiff in his attempt to submit a just claim in this type of case for jury determination.

Before discussing the second topic, it should be noted that the inclusion of a tractor-loader in the court's definition of a motor vehicle has not been questioned because of the limitation of this inquiry. Suffice it to say that this inclusion is subject to considerable and justified examination.

The second major issue in the principal case concerns the degree of care which must be afforded a guest by his host driver. Generally *res ipsa loquitur* will not apply in cases where gross negligence is required for liability. *Wood v. Shrewsbury*, 117 W. Va. 569, 186 S.E. 294 (1936). Since it is applicable in certain cases requiring only ordinary or reasonable care, it would appear that our

court is inferring that this lower degree of care—gross, willful, or wanton—is required for a guest to recover against the driver.

Two distinct duties have heretofore been required by our court in guest passenger cases. One concerns the vehicle. The driver owes the guest only the duty to warn him of known dangerous latent defects. *Lewellyn v. Shott,* 109 W. Va. 379, 155 S.E. 115 (1930); *Marple v. Haddad,* 103 W. Va. 508, 138 S.E. 113 (1927). The second duty requires that the driver must exercise reasonable care so as not to injure his guest. *Deskins v. Warden,* 122 W. Va. 644, 12 S.E.2d 47 (1940).

Some courts deny the use of *res ipsa loquitur* in guest passenger cases only because of applicable guest car statutes requiring a low degree of care. *Newell v. Riggins,* 197 Va. 515, 90 S.E.2d 154 (1955); *Orme v. Burr,* 157 Fla. 378, 25 So. 2d 870 (1946); *Minkovitz v. Fine,* 67 Ga. 176, 19 S.E.2d 561 (1942). West Virginia and many other states have no comparable statutes, however, and have consistently adhered to the common law requirement of reasonable care for recovery by a guest against his host driver. *Deskins v. Warden, supra; Darling v. Browning,* 120 W. Va. 666, 200 S.E. 737 (1938); *Broyles v. Hagerman,* 116 W. Va. 267, 180 S.E. 99 (1935); *Barger v. Chelpon,* 60 S.D. 66, 243 N.W. 97 (1932); *Chaisson v. Williams,* 130 Me. 341, 156 Atl. 157 (1931).

Since the objection to applying *res ipsa loquitur* in cases where gross negligence is required for liability—as in guest car statutes—is not present in West Virginia, there is no known reason why it should not be applied in cases similar to the one under discussion. Perhaps our court possesses valid reasons for the inapplicability of the doctrine in such cases, but these latent reasons have not been clearly and adequately expressed. It is hoped that further clarification will be shortly forthcoming on these obscure issues.

Subsequent to the writing of this comment the supreme court granted a petition for rehearing. It is possible, therefore, that the problems inherent in the principal decision may be remedied. 96 S.E.2d W. Va. Cumulative Rehearing Table (1957).

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